Supreme Court, U.S.
FILED
FEB 3 - 2006
OFFICE OF THE CLERK

No. 05-998

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

MICHAEL A. ROTKER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Constitutional provision involved 2
Statement 2
Reasons for granting the petition 7
Conclusion 18
Appendix A 1a
Appendix B 11a

TABLE OF AUTHORITIES

Cases:

Apprendi v. *New Jersey*, 530 U.S. 466 (2000) 8
Bain, Ex parte, 121 U.S. 1 (1887) 15
Bank of Nova Scotia v. *United States*, 487 U.S. 250 (1988) 13
Brecht v. *Abrahamson*, 507 U.S. 619 (1993) 10
Connecticut v. *Johnson*, 460 U.S. 73 (1983) 17
Costello v. *United States*, 350 U.S. 359 (1956) 13
Duncan v. *Louisiana*, 391 U.S. 145 (1968) 12
Hamling v. *United States*, 418 U.S. 87 (1974) 9
Hurtado v. *California*, 110 U.S. 516 (1884) 12
Johnson v. *United States*, 520 U.S. 461 (1997) 10, 14
Neder v. *United States*, 527 U.S. 1 (1999) 6, 8, 10, 11, 12, 14, 17
Rose v. *Clark*, 478 U.S. 570 (1986) 10
United States v. *Allen*, 406 F.3d 940 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005) 8
United States v. *Calandra*, 414 U.S. 338 (1974) 12, 13

Cases—Continued: Page

United States v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576 (6th Cir.), cert. denied, 537 U.S. 880 (2002) 8

United States v. *Corporan-Cuevas*, 244 F.3d 199 (1st Cir.), cert. denied, 534 U.S. 880 (2001) 9

United States v. *Cotton*, 535 U.S. 625 (2000) 6, 7, 12, 14, 15

United States v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) 5, 6, 11, 13, 15, 17

United States v. *Gracidas-Ulibrary*, 231 F.3d 1188 (9th Cir. 2000) 4

United States v. *Hasting*, 461 U.S. 499 (1983) 14

United States v. *Higgs*, 353 F.3d 281 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004) 8

United States v. *Lane*, 474 U.S. 438 (1986) 14

United States v. *Mechanik*, 475 U.S. 66 (1986) 7, 13, 14, 17

United States v. *Miller*, 471 U.S. 130 (1985) 10

United States v. *Omer*, 429 F.3d 835 (9th Cir. 2005) 6

United States v. *Prentiss*, 256 F.3d 971 (10th Cir. 2001) 8

United States v. *Robinson*, 367 F.3d 278 (5th Cir.), cert. denied, 543 U.S. 1005 (2004) 8, 14

United States v. *Spinner*, 180 F.3d 514 (3d Cir. 1999) 9

United States v. *Trennell*, 290 F.3d 881 (7th Cir.), cert. denied, 537 U.S. 1014 (2002) 8

Cases—Continued: Page

United States v. *Williams*, 504 U.S. 36 (1992) 12, 17
United States v. *Wydermyer*, 51 F.3d 319 (2d Cir. 1995) 10
United States, Ex parte, 287 U.S. 241 (1932) 12
Waller v. *Georgia*, 467 U.S. 39 (1984) 12

Constitution, statutes and rules:

U.S. Const.:
Amend. IV 13
Amend. V 2, 10, 12
Grand Jury Clause 9
Amend. VI 9, 10, 12
Amend. XIV 12
8 U.S.C. 1326(a) 2, 3, 9
8 U.S.C. 1326(b)(2) 3
Fed. R. Crim. P.:
Rule 6(a) 12
Rule 6(d) 12, 13
Rule 6(e) 12
Rule 6(f) 12
Rule 52(b) 14

Miscellaneous:

4 Wayne R. LaFave et al., *Criminal Procedure* (2d ed. Supp. 2006) 9

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

JUAN RESENDIZ-PONCE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-10a) is reported at 425 F.3d 729.

JURISDICTION

The judgment of the court of appeals was entered on October 11, 2005. On January 3, 2006, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including February 8, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, respondent was convicted of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). He was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 63-65. The court of appeals reversed and remanded on the grounds that the indictment omitted an element of the offense and that the omission constituted a "fatal flaw" necessitating automatic reversal. App., *infra*, 1a-10a.

1. On August 28, 2002, respondent, a Mexican national, was convicted in state court of kidnapping his former stepdaughter (who was also the mother of his 3-year-old child). While respondent was jailed for that offense, he admitted that he had previously been deported from the United States and that he had thereafter reentered the country without first obtaining permission to do so. On October 15, 2002, respondent was again removed from the country. App., *infra*, 2a; Presentence Report ¶ 18.

On June 1, 2003, respondent approached the port of entry at San Luis, Arizona, and presented a green card and driver's license to the border agent. Both forms of identification actually belonged to respondent's cousin, Antonio Resendiz. Respondent told the agent that he

was a legal resident and that he was going to Calexico, California. Because respondent did not resemble the person on the identification cards, the agent referred him to secondary inspection. When the agent at secondary inspection asked respondent about his intended destination, he said that he was going to Phoenix. Respondent was then detained. App., *infra*, 2a; Gov't C.A. Br. 3-5.

2. On July 30, 2003, a grand jury in the District of Arizona indicted respondent on one count of attempting to reenter the United States after deportation, in violation of 8 U.S.C. 1326(a). The indictment made the following allegations:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

App., *infra*, 2a. The indictment also indicated that respondent was being charged under 8 U.S.C. 1326(a) and that the government was seeking a sentencing enhancement under 8 U.S.C. 1326(b)(2), which provides for a higher maximum sentence where the prior removal was subsequent to a conviction for commission of an aggravated felony. App., *infra*, 3a.

3. Before trial, respondent moved to dismiss the indictment. Under Ninth Circuit law, one element of the offense of attempted unlawful reentry is that "the defen-

dant committed an overt act that was a substantial step towards reentering without * * * consent." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (2000) (en banc). In his motion to dismiss, respondent contended that the indictment "fail[ed] to allege an essential element, an overt act, or to state the essential facts of such overt act." Mot. to Dismiss 3. The district court orally denied the motion. C.A. E.R. 6.

At trial, the government introduced uncontested testimony that respondent had presented false identification at the border and made contradictory statements concerning his intended destination. See Tr. 191 (summarizing testimony). At the close of the evidence, the district court instructed the jury that the government was required to prove beyond a reasonable doubt, *inter alia*, that respondent had "attempted to enter the United States * * * by intentionally committing an overt act that was a substantial step towards reentering the United States." C.A. E.R. 36-37. The jury returned a guilty verdict, and the district court enhanced respondent's sentence on the ground that respondent's prior removal was subsequent to a conviction for commission of an aggravated felony (*viz.*, his conviction for kidnapping). App., *infra*, 3a. Respondent was sentenced to 63 months of imprisonment, to be followed by three years of supervised release. C.A. E.R. 63-65.

4. The court of appeals reversed and remanded for dismissal of the indictment. App., *infra*, 1a-10a. The court first noted that the commission of an overt act is an "essential element" of the crime of attempted unlawful reentry, *id.* at 3a-4a, and that "[t]he indictment in this case does not explicitly allege an overt act," *id.* at 4a. The court rejected the government's contention that the indictment *implicitly* alleged an overt act. *Id.* at 4a-

6a. Citing its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999), the court then held that, where the defendant made a timely objection at trial, "[f]ailure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis." App., *infra*, 6a. "The purpose of this rule," the court explained, "is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *Ibid.* The court noted that "[a] grand jury never passed on a specific overt act, and [respondent] was never given notice of what specific overt act would be proved at trial." *Id.* at 7a. The court therefore concluded that "failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326." *Ibid.*

Judge Reavley, sitting by designation, concurred. App., *infra*, 7a-10a. He stated that he was obligated to concur "because of this circuit's precedent," but that he "fail[ed] to see any other reason for this holding." *Id.* at 7a. "An indictment is constitutionally sufficient," he explained, "if it clearly informs the defendant of the precise offense of which he is accused so that he may prepare his defense and so that a judgment thereon will safeguard him from a subsequent prosecution for the same offense." *Id.* at 7a-8a. Judge Reavley contended that the indictment "fairly implied" that respondent had committed the requisite overt act, and concluded that "[t]he indictment should pass muster and would do so in other circuits." *Id.* at 9a.

5. Shortly after the panel's decision in this case, the Ninth Circuit denied the petition for rehearing en banc

in *United States* v. *Omer*, 429 F.3d 835 (2005), in which the government sought reconsideration of the rule, from the Ninth Circuit's earlier decision in *Du Bo*, *supra*, that the omission of an element of the offense from a federal indictment constituted structural error necessitating automatic reversal. App., *infra*, 11a-12a.

Judge Graber, joined by Judges Kozinski, O'Scannlain, Bybee, Callahan, and Bea, dissented from the denial of rehearing en banc in *Omer*. App., *infra*, 12a-28a. She reasoned that the "absolute rule" of *Du Bo* "makes no sense" and that the court "should take this opportunity to reconsider [it]." *Id.* at 12a. Judge Graber first contended that, to the extent that the rule of *Du Bo* rested on the premise that the omission of an element from an indictment was of jurisdictional significance, that premise was "directly eliminated" by this Court's decision in *United States* v. *Cotton*, 535 U.S. 625 (2000). App., *infra*, 15a. She then explained that the *Du Bo* rule was more generally inconsistent with this Court's decision in *Neder* v. *United States*, 527 U.S. 1 (1999), which held that the omission of an offense element from the petit jury's instructions does not constitute structural error. App., *infra*, 21a-22a. Judge Graber reasoned that "[t]he situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not." *Id.* at 22a. "[T]he right to a grand jury finding of probable cause as to each element of the offense," she continued, "is no more important, and no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt." *Ibid.*

Judge Graber also rejected the proposition that "there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from the indictment." App., *infra*, 22a. To the contrary, she reasoned, "it is possible (and, indeed, commonplace) to review the omission of an element from a grand jury's indictment for harmless error." *Id.* at 22a-23a. Judge Graber observed that, under this Court's decisions, most errors in grand jury proceedings are subject to harmless-error analysis. *Id.* at 23a. In particular, she noted that this Court's decision in *United States* v. *Mechanik*, 475 U.S. 66 (1986), "suggests that there is nothing about the nature of a grand jury proceeding that precludes harmless error review." App., *infra*, 23a-24a. And she noted that this Court's decision in *Cotton*, *supra*, which held that the omission of a sentence-enhancing fact from a federal indictment did not constitute reversible *plain* error, "rebut[s] the idea that omission of an element from an indictment always renders a criminal proceeding unfair." *Id.* at 24a. Finally, Judge Graber contended that en banc review was warranted because "six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error." *Id.* at 25a.

After the court of appeals denied the government's petition for rehearing en banc on the structural-error issue in *Omer*, *supra*, the government decided not to seek rehearing en banc on that issue in this case.

REASONS FOR GRANTING THE PETITION

In the decision below, the court of appeals reaffirmed its rule that the omission of an element of an offense from a federal indictment constitutes structural error. That decision conflicts with the decisions of numerous

other circuits, which have treated such omissions, like most other constitutional errors, as harmless where it is clear beyond a reasonable doubt that the error did not affect the outcome of the proceedings. The decision below is also inconsistent with this Court's decisions—most notably, *Neder* v. *United States*, 527 U.S. 1 (1999), which held that a similar omission from the petit jury's instructions can constitute harmless error. Because the question presented is an important and recurring one in federal prosecutions and is squarely presented in this case, this Court's review is warranted.

1. There is a clear and well-established circuit conflict on the question whether the omission from a federal indictment of an offense element (or a fact that increases the penalty for a crime beyond the statutory maximum)[1] can constitute harmless error. The majority of courts of appeals to have considered the issue have held that such an omission is subject to harmless-error analysis. See *United States* v. *Allen*, 406 F.3d 940, 943-945 (8th Cir. 2005), petition for cert. pending, No. 05-6764 (filed Sept. 29, 2005);[2] *United States* v. *Robinson*, 367 F.3d 278, 285-286 (5th Cir.), cert. denied, 543 U.S. 1005 (2004); *United States* v. *Higgs*, 353 F.3d 281, 304-307 (4th Cir. 2003), cert. denied, 543 U.S. 999 (2004); *United States* v. *Trennell*, 290 F.3d 881, 889-890 (7th Cir.), cert. denied, 537 U.S. 1014 (2002); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-581 (6th Cir.), cert. denied, 537 U.S. 880 (2002); *United States* v. *Prentiss*, 256 F.3d

---

[1] This Court has suggested that a sentence-enhancing fact is the "functional equivalent" of an offense element. *Apprendi* v. *New Jersey*, 530 U.S. 466, 494 n.19 (2000).

[2] The government has filed a brief in *Allen* suggesting that it be held pending the disposition of this case. A copy of this petition is being provided to the petitioner in *Allen*.

971, 981-985 (10th Cir. 2001) (en banc); *United States* v. *Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir.), cert. denied, 534 U.S. 880 (2001). By contrast, the Third Circuit, like the Ninth Circuit in this case, has held that such an omission requires automatic reversal. See *United States* v. *Spinner*, 180 F.3d 514, 515-516 (3d Cir. 1999). Judges and commentators alike have recognized the existence of this conflict. See, *e.g.*, App., *infra*, 25a-26a (Graber, J., dissenting from denial of rehearing en banc in *Omer*); *Prentiss*, 256 F.3d at 992-993 (Henry, J., dissenting in part); 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a), at 155, 161 n.39.51 (2d ed. Supp. 2006).

2. Under the Ninth Circuit's view of the elements of an attempt to reenter the United States in violation of 8 U.S.C. 1326(a), the indictment in this case was constitutionally deficient because it did not allege the commission of an overt act that was a substantial step toward unlawful reentry.[3] In order to ensure that the grand jury considers all of the elements of the offense in determining whether to indict, the Grand Jury Clause of the Fifth Amendment requires that every offense element be charged in a federal indictment. See, *e.g.*, *Hamling* v. *United States*, 418 U.S. 87, 117 (1974).[4] The

---

[3] The government does not seek review of the court of appeals' threshold holdings that the commission of an overt act was an element of the offense of attempted unlawful reentry and that the indictment failed to allege that element implicitly by alleging that the defendant had engaged in an "attempt[]" to reenter unlawfully.

[4] A claim that an indictment does not allege all of the elements of the underlying offense is conceptually distinct from a claim that an indictment provides insufficient detail to inform the defendant of the nature of the charge against him. The latter claim is better classified as a Sixth Amendment notice claim. See U.S. Const. Amend. VI (providing that

court of appeals erred, however, by holding that the omission of an offense element necessitates automatic reversal. That holding cannot be squared with this Court's precedents on harmless-error review.

a. This Court has identified a narrow class of fundamental constitutional errors as so intrinsically harmful that they require reversal without inquiry into whether they had an effect on the outcome. See, *e.g.*, *Johnson* v. *United States*, 520 U.S. 461, 468-469 (1997) (listing examples). Errors are intrinsically harmful, or "structural," only when they "infect the entire trial process," *Brecht* v. *Abrahamson*, 507 U.S. 619, 629-630 (1993), and "necessarily render a trial fundamentally unfair," *Rose* v. *Clark*, 478 U.S. 570, 577 (1986). See *Neder*, 527 U.S. at 8. With respect to other types of constitutional error as to which the defendant made a timely objection at

---

"the accused shall enjoy the right * * * to be informed of the nature and cause of the accusation"). In order for a defendant to obtain reversal based on a claimed infringement of the Sixth Amendment right to notice, he must establish that the insufficient notice caused prejudice to the defense. See, *e.g.*, *United States* v. *Wydermyer*, 51 F.3d 319, 325 (2d Cir. 1995) (noting that, despite assertion that the indictment was insufficient, "[t]he defendants were not 'prejudicially surprised' by the claimed omission of elements of the offense in violation of the defendants' Sixth Amendment right to notice of the charges") (citation omitted) (quoting *United States* v. *Miller*, 471 U.S. 130, 134 (1985)). While the court of appeals mentioned in passing that respondent had a right "to be apprised of what overt act the government will try to prove at trial," App., *infra*, 6a, it ultimately justified its rule of automatic reversal by explaining that "[t]he purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that the defendant is not convicted on the basis of facts not found by, and perhaps not even presented to the grand jury that indicted him," *ibid.* (internal quotation marks omitted). This case thus implicates a rule of automatic reversal for Fifth Amendment violations, not a Sixth Amendment rule.

trial, an appellate court must disregard the error as harmless where it is clear beyond a reasonable doubt that the error did not affect the outcome of the proceedings. See, *e.g.*, *id.* at 7-8.

b. In *Neder*, this Court held that the failure to instruct the petit jury on an element of the offense does not constitute structural error. 527 U.S. at 8-15. The Court reasoned that "[t]he error at issue here * * * differs markedly from the constitutional violations that we have found to defy harmless-error review." *Id.* at 8. "Unlike such defects as the complete deprivation of counsel or trial before a biased judge," the Court explained, "an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9. With regard to the error at issue, the Court noted that "[the defendant] was tried before an impartial judge, under the correct standard of proof and with the assistance of counsel," and "a fairly selected, impartial jury was instructed to consider all of the evidence and argument in respect to [the defendant's] defense against the tax charges." *Ibid.*

Contrary to the court of appeals' reasoning in its earlier decision in *United States* v. *Du Bo*, 186 F.3d 1177, 1180 n.2 (9th Cir. 1999), there is no justification for treating the failure to submit an offense element to the grand jury differently from the failure to submit an offense element to the petit jury. The omission of an element from the indictment does not render a criminal prosecution "fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. If anything, the type of omission at issue here constitutes a far *weaker* candidate for structural error than the type of omission in *Neder*, for at least two reasons.

First, the Fifth Amendment right to an indictment by a grand jury, unlike the Sixth Amendment right to a trial by a petit jury, has not been incorporated against the States through the Fourteenth Amendment as an essential requirement of fundamental fairness. Compare *Hurtado* v. *California*, 110 U.S. 516, 538 (1884) (right to indictment by a grand jury), with *Duncan* v. *Louisiana*, 391 U.S. 145, 147-158 (1968) (right to a trial by a petit jury). It would be incongruous to conclude that a constitutional right that does not even apply in a state prosecution is so fundamental that its infringement in a federal prosecution would give rise to structural error.

Second, although the grand jury undoubtedly performs a vital protective function, it is the petit jury that provides the ultimate protection for the accused. See *United States* v. *Cotton*, 535 U.S. 625, 634 (2002). The grand jury is not the final arbiter of the facts, but instead is merely required to determine, by majority vote, whether there is probable cause to believe that the accused has committed the charged crime. See Fed. R. Crim. P. 6(a) and (f). In grand jury proceedings, moreover, the prosecutor has no obligation to present exculpatory evidence, see *United States* v. *Williams*, 504 U.S. 36, 51-55 (1992); the accused has no right to present evidence at all, see *United States* v. *Calandra*, 414 U.S. 338, 343-344 (1974); and the prosecutor may try again if the grand jury fails to return an indictment, see *Ex parte United States*, 287 U.S. 241, 250-251 (1932).[5] It

[5] Other protections afforded to the accused at the trial stage are not afforded at the grand jury stage. Whereas the accused has the right to a public trial, see U.S. Const. Amend. VI; *Waller* v. *Georgia*, 467 U.S. 39, 46 (1984), the grand jury operates in secret, see Fed. R. Crim. P. 6(d) and (e). Moreover, the grand jury may consider evidence that

therefore follows, *a fortiori*, from *Neder*'s holding—that the failure to obtain a finding by the petit jury on an element of an offense is not structural error—that the omission of an offense element from an indictment is not structural error either.

c. Other decisions by this Court reinforce the conclusion that the omission of an offense element from a federal indictment is amenable to harmless-error analysis. In *United States* v. *Mechanik*, 475 U.S. 66 (1986), the Court held that the defendants were not entitled to reversal of their convictions because of an error in the grand jury proceedings. In that case, two witnesses appeared simultaneously before the grand jury, in violation of Federal Rule of Criminal Procedure 6(d). The Court acknowledged that the error "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged." 475 U.S. at 70. The Court ultimately concluded, however, that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt." *Ibid.* *Mechanik* therefore stands for two propositions. First, contrary to the court of appeals' apparent suggestion in *Du Bo*, see 186 F.3d at 1179, errors in grand jury proceedings can generally be analyzed for harmlessness. See *Mechanik*, 475 U.S. at 70; accord *Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254 (1988). Second, in evaluating whether an error at the grand jury stage is in fact harmless, a reviewing court may appropriately con-

---

would not be admissible at trial. See, *e.g.*, *Calandra*, 414 U.S. at 349-355 (evidence obtained in violation of the Fourth Amendment); *Costello* v. *United States*, 350 U.S. 359, 361-364 (1956) (inadmissible hearsay).

sider the entire record, including the petit jury's subsequent verdict. See *Mechanik*, 475 U.S. at 70; accord *United States* v. *Lane*, 474 U.S. 438, 448 n.11 (1986); *United States* v. *Hasting*, 461 U.S. 499, 509 n.7 (1983).

In *Cotton*, *supra*, the Court held that the failure *both* to allege a sentence-enhancing fact (*i.e.*, drug quantity) in the indictment *and* to obtain a finding on that fact from the petit jury did not constitute reversible error. 535 U.S. at 631-634. Because the defendants in *Cotton* did not preserve their objection at trial, the case involved the federal plain-error doctrine, which applies when the defendant fails to make a timely objection in the district court. Fed. R. Crim. P. 52(b). Under that doctrine, a reviewing court asks whether (1) there is error; (2) the error is plain; (3) the error affects substantial rights; and (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *Johnson*, 520 U.S. at 466-467.

In *Cotton*, the Court concluded that the fourth component of the plain-error inquiry was not satisfied because any error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. 535 U.S. at 632-633. That conclusion suggests that such an error is not structural either, insofar as a structural error is one that "*necessarily* render[s] a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Neder*, 527 U.S. at 9. At least one of the courts of appeals that have held that the omission of an offense element from an indictment does not constitute structural error has construed *Cotton* in that fashion. See *Robinson*, 367 F.3d at 285-286.[6] Moreover,

---

[6] Although the Ninth Circuit's decision in *Du Bo* and the Third Circuit's decision in *Spinner* predate *Cotton* (and, for that matter, the

in holding that the fourth component of the plain-error inquiry was not satisfied, the Court noted that the evidence concerning the sentence-enhancing fact was "overwhelming" and "essentially uncontroverted" and concluded that the grand jury "[s]urely" would have found that fact. *Cotton*, 535 U.S. at 633. Like *Mechanik*, therefore, *Cotton* supports the proposition that errors at the grand jury phase can be quantified and are thus properly subject to harmless-error review.

In addition, in *Cotton*, the Court held that defects in an indictment, such as the omission of a sentence-enhancing fact, do not deprive a court of subject-matter jurisdiction over the ensuing prosecution, and overruled its earlier decision in *Ex parte Bain*, 121 U.S. 1 (1887), to the extent that it held otherwise. 535 U.S. at 630-631. The Court explained that "*Bain*'s elastic concept of jurisdiction is not what the term 'jurisdiction' means today, *i.e.*, the courts' statutory or constitutional *power* to adjudicate the case." *Id.* at 630 (internal quotation marks omitted). As Judge Graber noted in her dissenting opinion in *Omer* (App., *infra*, 15a), *Cotton* therefore eliminates one of the premises of the court of appeals' rule. See *Du Bo*, 186 F.3d at 1180 (stating that, where an indictment "lacks a necessary allegation," it "does not properly allege an offense against the United States" and "leaves nothing for a petit jury to ratify") (internal quotation marks omitted). Because the decision below, which reaffirmed the *Du Bo* rule, is inconsistent with

---

various decisions of other courts of appeals with which they are in conflict), that fact provides no basis for denying review. The Ninth Circuit reaffirmed the *Du Bo* rule both in this case and in *Omer*, and the en banc Ninth Circuit refused to reconsider the *Du Bo* rule in *Omer* despite the government's reliance on *Cotton*. See Pet. for Reh'g at 10-11, *United States* v. *Omer*, 429 F.3d 835 (2005) (No. 03-30513).

Cotton in that respect, and because it is more broadly inconsistent with this Court's harmless-error decisions (and the decisions of numerous other circuits), further review is warranted.

3. This case squarely presents an issue of importance to the administration of federal criminal justice. The indictment in this case omitted a single element of the offense of attempted unlawful reentry, as interpreted by the Ninth Circuit: namely, the commission of an overt act that was a substantial step toward unlawful reentry. At trial, the government introduced uncontested testimony that respondent had committed at least two acts that satisfied that element: namely, that respondent had presented false identification at the border and that he had made contradictory statements concerning his intended destination. See Tr. 191 (summarizing testimony). At the close of the evidence, the district court specifically instructed the jury that the government was required to prove, beyond a reasonable doubt, that respondent had committed an overt act. C.A. E.R. 36-37. Having been so instructed, the jury returned a guilty verdict. App., *infra*, 3a. It is therefore clear that, if the court of appeals had applied harmless-error analysis, it would have concluded that the error at issue was in fact harmless, because the grand jury unquestionably would have determined that there was probable cause to believe that respondent had committed the requisite overt act. The Ninth Circuit's rule that the omission of an offense element from a federal indictment constitutes structural error is therefore outcome-determinative in this case.[7]

---

[7] The government did not expressly seek reconsideration of the *Du Bo* rule before the court of appeals panel in this case. This Court's

The question presented is a recurring and important one. There are a significant number of cases in which an element of the offense is inadvertently omitted from a federal indictment, whether because of prosecutorial oversight or simply because of uncertainty as to what constitutes an offense element. In those cases, the court of appeals' rule will compel automatic reversal. As this Court has noted, "[t]he reversal of a conviction entails substantial societal costs: it forces jurors, witnesses, courts, the prosecution, and the defendants to expend further time, energy, and other resources to repeat a trial that has already once taken place." *Mechanik*, 475 U.S. at 72. And because of the "passage of time, erosion of memory, and dispersion of witnesses," requiring a retrial will sometimes "cost society the right to punish admitted offenders," and, even when it does not, "the intervening delay may compromise society's interest in the prompt administration of justice." *Ibid.* (brackets, citations, and internal quotation marks omitted). Applying harmless-error review to the omission of an offense element from a federal indictment appropriately balances "society's interest in punishing the guilty" against the constitutional right to indictment by a grand jury. *Neder*, 527 U.S. at 18 (quoting *Connecticut* v. *Johnson*, 460 U.S. 73, 86 (1983) (plurality opinion)). The Court's

---

review is appropriate, however, where, as here, the court of appeals reaffirmed a rule from a recent decision which the government opposed at the time of adoption, see *Du Bo*, 186 F.3d at 1180, and the government did not concede in the instant case that the rule from the earlier decision was correct. See *Williams*, 504 U.S. at 40-45. Moreover, the government did expressly seek reconsideration of the *Du Bo* rule by the en banc Ninth Circuit in *Omer*. Once the en banc court of appeals refused to grant rehearing in that case, it would have been futile to seek reconsideration of the *Du Bo* rule in this one.

intervention is warranted to resolve the clear and entrenched circuit conflict on this important issue.[8]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

ALICE S. FISHER
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

KANNON K. SHANMUGAM
Assistant to the Solicitor General

MICHAEL A. ROTKER
Attorney

FEBRUARY 2006

---

[8] It is not necessary for the Court to hold this petition pending its disposition of *Washington* v. *Recuenco*, cert. granted, No. 05-83 (Oct. 17, 2005). That case presents the discrete question whether an error in enhancing a sentence based on a fact not found by the petit jury, like the omission of an offense element from the jury instructions, is susceptible to harmless-error analysis. This case, by contrast, involves the omission of an *element* of the offense (not a sentence-enhancing fact) at the *grand jury* stage. The outcome of *Recuenco* therefore should not affect the disposition of this case.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-10302

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

JUAN RESENDIZ-PONCE, DEFENDANT-APPELLANT

Filed: Oct. 11, 2005

Before GOODWIN, REAVLEY,* and RAWLINSON, Circuit Judges.

GOODWIN, Circuit Judge.

Juan Resendiz-Ponce, a native and citizen of Mexico, challenges his conviction and sentence for attempting to reenter the United States after having been previously deported subsequent to committing an aggravated felony, pursuant to 8 U.S.C. § 1326(a), (b)(2). He argues that (1) the indictment did not adequately allege an overt act; (2) his Miranda rights were violated; (3) the judge erroneously rejected his proffered jury instructions; and (4) his sentence violates the Sixth Amendment. Because the indictment was insufficient and should be dismissed, we do not reach his remaining claims.

---

* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Facts and Procedural History

Resendiz-Ponce entered the United States illegally in 1988, and was ordered deported on March 12, 1997. He reentered the United States illegally in July, 2002. On August 28, 2002, he was convicted of kidnapping his common-law wife and sentenced to 45 days in county jail. On October 15, 2002, while still in county jail, he was questioned by an INS agent and admitted that he was an alien, that he was previously deported, and that he had not sought permission to re-enter from the Attorney General. He was deported later that same day.

In June 2003, Resendiz approached a port of entry at the U.S./Mexican border on foot. Resendiz presented photo identification to the border agent, claiming to be a legal resident. This identification belonged to Antonio Resendiz, Juan's cousin. Because Resendiz did not look like the tendered photo, the agent directed him to a secondary inspection area, where he was questioned. In due course, he was indicted for attempting to reenter the United States in violation of 8 U.S.C. § 1326(a). The indictment reads as follows:

> On or about June 1, 2003, JUAN RESENDIZ-PONCE, an alien, knowingly and intentionally attempted to enter the United States of America at or near San Luis in the District of Arizona, after having been previously denied admission, excluded, deported, and removed from the United States at or near Nogales, Arizona, on or about October 15, 2002, and not having obtained the express consent of the Secretary of the Department of Homeland Security to reapply for admission.

In violation of Title 8, United States Code, Sections 1326(a) and enhanced by (b)(2).

At trial, Resendiz moved to suppress the statements he made to the INS agent while in jail in 2002 because he did not receive Miranda warnings, to dismiss the indictment because it did not allege an overt act, and to strike a portion of the indictment related to 8 U.S.C. § 1326(b)(2) because the indictment did not allege that his prior deportation occurred subsequent to his prior conviction. The district court denied these motions. Resendiz also requested a jury instruction that would have told the jury that the government must prove that Resendiz performed the overt act of successfully re-entering the United States. The court denied this request. Resendiz was convicted. At his sentencing hearing, the district court determined that he was previously deported and that this deportation occurred subsequent to his conviction for an aggravated felony. Therefore, the statutory maximum for his sentence was increased from 2 years to 20 years, pursuant to § 1326(b)(2). He was sentenced to 63 months, the middle of the applicable guideline range of 57-71 months. This appeal followed.

Jurisdiction and Standard of Review

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This court has jurisdiction pursuant to 28 U.S.C. § 1291. We review the sufficiency of an indictment *de novo*. *United States* v. *Rodriguez*, 360 F.3d 949, 958 (9th Cir. 2004).

Discussion

The crime of attempted unlawful entry into the United States, as defined by § 1326, includes as an essential element that "the defendant committed an

overt act that was a substantial step toward reentering . . ." *United States* v. *Gracidas-Ulibarry*, 231 F.3d 1188, 1196 (9th Cir. 2000) (*en banc*).[1]

The indictment in this case does not explicitly allege an overt act. It charges neither the physical crossing of the border, nor the tendering of the bogus identification card, nor any other fact, as a substantial step toward reentry. Either or both of those acts could have been stated in the indictment. The government argued to the district court that the "overt act is the attempt to enter in this case" and argues on appeal that "the overt act of an attempted entry crime is the entry itself." The first argument is a non-starter. The overt act with which the defendant is charged obviously cannot be identified with the ultimate legal question of guilt or innocence. The second argument can be construed as either (1) the legal claim that a charge of attempted entry necessarily implies that the associated overt act was actual entry, or (2) the factual claim that in this case, the indictment implicitly alleged physical entry and thus identified an overt act. The district court held that "being here is sufficient to advise [Resendiz] . . . of what it is he's charged with," thus apparently endorsing (2), and possibly also endorsing the proposition that any error was harmless and did not prejudice Resendiz. We reject both of these potential interpreta-

---

[1] Unlike the separate offense of "being found in" the United States, where failure to allege the overt act of crossing the border (or other overt act) is not a fatal defect, because not an "essential element," the other two § 1326 offenses for which deported aliens may be prosecuted require an overt act to be alleged in the indictment. *Cf. United States* v. *Bello-Bahena*, 411 F.3d 1083 (9th Cir. 2005).

tions of the government's remaining argument as a ground for salvaging the defective indictment.

The government relies on dicta from a 1921 decision to argue that the overt act related to an attempted reentry is an actual reentry. *Mills* v. *United States*, 273 F. 625, 627 (9th Cir. 1921) ("The attempt is in itself . . . the act of crossing the boundary line into the United States."); *quoted in United States* v. *Corrales-Beltran*, 192 F.3d 1311, 1319-20 (9th Cir. 1999). *Mills* stands only for the proposition that an actual entry is a possible means of violating a statute criminalizing attempted entry, not that it is the only means and that its occurrence is therefore necessarily implied by an attempt charge. *Id.*; *accord United States* v. *Rivera-Relle*, 333 F.3d 914, 921 (9th Cir. 2003) ("The fact that an alien may have completed an entry into the United States does not, in any way, preclude a conviction for attempted entry."). Nothing in these cases suggests that an indictment for attempted entry always or even often implies an actual entry.

The second interpretation of the government's argument is that the indictment implicitly alleged that Resendiz committed the overt act of physically crossing the border by stating that "[o]n or about June 1, 2003, Juan Resendiz-Ponce . . . intentionally attempted to enter the United States at or near San Luis." On this interpretation, apparently endorsed by the district court, Resendiz' current physical presence in the United States warrants the inference that he physically crossed the border, thus rendering the indictment sufficient. It is true that any facts "necessarily implied" by an indictment are presumptively charged. *See, e.g.*, *United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). However, there is an essential logical distinction

between what is implied by the language of the indictment and what is implied by facts outside the four corners of the indictment. Neither common knowledge nor appraisal of probabilities will take the place of an omitted but essential allegation.

Failure to allege an essential element of the offense is a fatal flaw not subject to mere harmless error analysis. *See, e.g., United States* v. *Du Bo*, 186 F.3d 1177, 1179 (9th Cir. 1999) ("if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal"). The purpose of this rule is to secure the basic institutional purpose of the grand jury, by ensuring that a defendant is not "convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury that indicted him." *United States* v. *Keith*, 605 F.2d 462, 464 (9th Cir. 1979); *quoted in Du Bo*, 186 F.3d at 1179. As the Supreme Court has explained, this purpose has its constitutional roots in the Fifth and Sixth Amendments and historical roots in the English common-law tradition. *Russell* v. *United States*, 369 U.S. 749, 770, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962). While this protection may not extend to incidentals and details unnecessary to a conviction, an overt act that is a substantial step toward underlying offense is at the very core of an attempt charge. *Cf. United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000) (holding that a slight discrepancy in dates and locations between the grand jury indictment and the facts proved at trial was "not significant"). The defendant has a right to be apprised of what overt act the government will try to prove at trial, and he has a right to have a grand jury consider whether to charge that

specific overt act. Physical crossing into a government inspection area is but one of a number of other acts that the government might have alleged as a substantial step toward entry into the United States. The indictment might have alleged the tendering a bogus identification card; it might have alleged successful clearance of the inspection area; or it might have alleged lying to an inspection officer with the purpose of being admitted. Instead, the indictment merely alleged that Resendiz "attempted to enter" the United States, which simply repeats the ultimate charge against him. A grand jury never passed on a specific overt act, and Resendiz was never given notice of what specific overt act would be proved at trial.

Relying on *Du Bo*, we reversed a conviction for attempted reentry in violation of § 1326, where the indictment failed to explicitly allege specific intent, without inquiring whether the omission prejudiced the defendant. *United States* v. *Pernillo-Fuentes*, 252 F.3d 1030 (9th Cir. 2001). We now hold that failure to allege any specific overt act that is a substantial step toward entry is a fatal defect in an indictment for attempted entry following deportation under 8 U.S.C. § 1326. Accordingly, we reverse the judgment against Resendiz and direct the district court to dismiss the indictment without prejudice to reindictment.

REVERSED and REMANDED.

REAVLEY, Circuit Judge, concurring:

I must concur because of this circuit's precedent, but I fail to see any other reason for this holding. An indictment is constitutionally sufficient if it clearly informs the defendant of the precise offense of which he is

accused so that he may prepare his defense and so that a judgment thereon will safeguard him from a subsequent prosecution for the same offense. 1 CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE CRIMINAL § 125 (3d ed. 2000 & Supp. 2005). This indictment does that.

The indictment informs us when and where the defendant intentionally tried to enter the country without consent. The indictment was sufficiently clear to enable Resendiz to prepare his defense. Resendiz raises no contention that he received inadequate notice of the crime charged, nor does he contend that he did not present false identification nor make inaccurate statements at the border, as government agents testified. His contention is only that the indictment failed to charge him with attempting to enter illegally because it does not contain a laundry list of the actions he took in doing so.

It is "inconceivable" that Resendiz would have presented a different defense if the indictment had been more detailed. *United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir. 1992). Likewise, the indictment's reference to a specific date and place where Resendiz attempted to enter the United States is sufficient to allow him to claim double jeopardy if he is again charged with the same crime.

This circuit has incorporated the common law meaning of attempt into the crime of attempted illegal reentry under § 1326 and now requires the elements of that definition, including commission of an overt act, to be in the indictment. However, the legal definition of "attempt" does not change with each indictment; it is a term sufficiently definite in legal meaning to give a defendant notice of the charge against him. *Hamling* v.

United States, 418 U.S. 87, 118-19, 94 S. Ct. 2887, 41 L. Ed. 2d 590 (1974) (finding an obscenity indictment sufficient even though it followed statutory language and did not particularize the various elements required to constitute obscenity). As Professor Wright observed, and numerous courts have echoed, "[t]he test for sufficiency ought to be whether it is fair to defendant to require him or her to defend on the bases of the charge as stated in the particular indictment or information. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested." WRIGHT & MILLER § 125.

The indictment charged Resendiz with "knowingly and intentionally" attempting to enter the country in violation of § 1326 and thus fairly implied that he committed an overt act in doing so. The judge directed the jury to convict Resendiz under § 1326 only if it found beyond a reasonable doubt that he "intentionally committed an overt act that was a substantial step towards reentering the United States." Resendiz was adequately informed of his offense and no unfairness resulted from requiring him to defend on the basis of the charge as stated. The indictment should pass muster and would do so in other circuits. *See, e.g. United States* v. *Blackburn*, 9 F.3d 353 (5th Cir. 1993) (finding indictment for bank fraud sufficient, notwithstanding defendant's contention that it was fatally defective for failure to allege elements "knowingly" and "executes or attempts to execute," because indictment fairly imported all elements and included statutory section number).

While the panel faults the indictment for failure to include more detail, the test is not whether the indict-

ment could have been framed in a more satisfactory manner, but whether it conforms to minimal constitutional standards. *United States* v. *Hinton*, 222 F.3d 664, 672 (9th Cir. 2000). Respectfully but boldly, I caution against the abandonment of common sense such as that illustrated in two cases that bedeviled the Texas courts for years. *See Northern* v. *State*, 150 Tex. Crim. 511, 203 S.W.2d 206 (1947) (holding that an indictment charging that defendant killed the deceased by kicking and stomping her without charging that defendant stomped with his feet was fatally defective as failing to charge the means employed in commission of the offense) *implied overruling recognized by Vaughn* v. *State*, 607 S.W.2d 914 (Tex. Crim. App. 1980); *Gragg* v. *State*, 148 Tex. Crim. 267, 186 S.W.2d 243 (1945) (holding that an indictment charging that defendant killed his wife by drowning her was defective as not alleging the manner and means used to accomplish the drowning).

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 03-30513, 03-30544

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

TIMOTHY W. OMER, DEFENDANT-APPELLANT

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

TIMOTHY W. OMER, DEFENDANT-APPELLEE

Oct. 31, 2005

Before HAWKINS, THOMAS, and McKEOWN, Circuit Judges.

ORDER

The panel has voted to deny the petition for panel rehearing and the petition for rehearing en banc. A judge of the court requested a vote on whether to rehear the case en banc, but the request failed to receive a majority of votes of the nonrecused active judges in favor of en banc rehearing.

The petition for panel rehearing and the petition for rehearing en banc are DENIED.

GRABER, Circuit Judge, with whom KOZINSKI, O'SCANNLAIN, BYBEE, CALLAHAN, and BEA, Circuit Judges, join, dissenting from the denial of rehearing en banc.

I respectfully dissent from the court's decision not to take this case en banc. We should take this opportunity to reconsider the rule that our prior precedent required the three-judge panel to apply: *automatic* reversal of any conviction in which the defendant timely, and correctly, objected that an element of the crime was missing from the indictment. *See United States* v. *Du Bo*, 186 F.3d 1177 (9th Cir. 1999) (holding that such a deficiency is not subject to harmless error review). An absolute rule makes no sense. When the defendant has actual notice of the missing element in advance of trial, evidence of the missing element is introduced, the jury is properly instructed about the element, and the finder of fact finds the element beyond a reasonable doubt, the defendant may not have been prejudiced by the omission; reversal should not be compelled. We ought not cling to a rule that drains judicial resources when we can review—indeed, have reviewed, in very similar circumstances—the prejudice caused by the omission of an element from an indictment.

A. *The* Du Bo *decision, establishing the "automatic reversal rule" at issue, rested on three premises.*

The court in *Du Bo* held that, "if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is . . . a fatal flaw requiring dismissal of the indictment." 186

F.3d at 1179. We supported that automatic reversal rule with three premises.

The first premise was jurisdictional. We asserted that an indictment that omits an element "does not properly allege an offense against the United States" and thereby "leaves nothing for a petit jury to ratify." *Id.* at 1180 (internal quotation marks omitted). We drew this idea in part from a Fourth Circuit decision holding that harmless error is inapplicable because the omission of an essential element deprives the court of jurisdiction: "The absence of prejudice to the defendant in a traditional sense does not cure a substantive, jurisdictional defect in an indictment." *United States* v. *Hooker*, 841 F.2d 1225, 1232 (4th Cir. 1988) (en banc) (emphasis added); *see also Du Bo*, 186 F.3d at 1180 (citing *Hooker*). We also appeared to hold that the jurisdictional basis for our rule of automatic reversal was supported by *Russell* v. *United States*, 369 U.S. 749, 82 S. Ct. 1038, 8 L. Ed. 2d 240 (1962), and *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960). *See Du Bo*, 186 F.3d at 1179-80 (relying on those cases).[1]

---

[1] Other circuits also have interpreted *Russell* and *Stirone* to require automatic reversal. *See, e.g.*, *United States* v. *Spinner*, 180 F.3d 514, 516-17 (3d Cir. 1999); *Hooker*, 841 F.2d at 1230. Some of those circuits are rethinking the foundations of that position. *See, e.g.*, *United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (relying on later Supreme Court precedents), cert. denied, ___U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (rejecting applicability of cases, such as *Stirone*, that predated *Chapman* v. *California*, 386 U.S. 18, 23-24, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967)); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3 (2d ed. 1999 & Supp. 2005).

Second, we said that omissions from a grand jury indictment, unlike omissions from jury instructions, simply are not susceptible to harmless error review. *Du Bo*, 186 F.3d at 1179-80.

Finally, we expressed a desire to give defendants an incentive to bring timely objections. We limited the automatic reversal rule to timely challenges, reasoning that under harmless error review, filing a pretrial motion would be "self-defeating" because the very filing of the motion would demonstrate that the defendant had notice of the missing element. *Id.* at 1180 n.3.

In this case, Defendant Timothy W. Omer raised a timely challenge to the omission of two elements from the indictment against him for bank fraud. We applied the rule of *Du Bo* and reversed Defendant's conviction because of one of those omissions.[2] At the time we

---

[2] Defendant was charged with bank fraud in violation of 18 U.S.C. § 1344(1). The indictment alleged that Defendant and an accomplice "knowingly executed or attempted to execute a scheme or artifice to defraud" four financial institutions by way of a check-kiting scheme. The indictment described that "scheme or artifice" in some detail but did not allege that the scheme was *material* to—i.e., "capable of influencing"—the bank's decision to release funds, as required by *Neder* v. *United States*, 527 U.S. 1, 16, 24-25, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999). The indictment also failed to allege that the financial institutions were federally insured. *See United States* v. *Ali*, 266 F.3d 1242, 1243 (9th Cir. 2001) (" 'Proof of federally-insured status of the affected institution is, for both section 1344 and section 1014, a jurisdictional prerequisite as well as an element of the substantive crime.' " (quoting *United States* v. *Key*, 76 F.3d 350, 353 (11th Cir. 1996) (per curiam))). The district court denied Defendant's pretrial motion to dismiss the indictment for failure to allege those two elements.

After a trial, the jury convicted Defendant. The jury instructions did not mention "materiality," but they did require the jury to find beyond a reasonable doubt that the affected institutions

decided *United States* v. *Omer*, 395 F.3d 1087 (9th Cir. 2005) (per curiam), however, none of the three rationales articulated in *Du Bo* supported continued application of the automatic reversal rule.

B. *Supreme Court precedent does not support the jurisdictional rationale for* Du Bo.

After we issued *Du Bo*, the Supreme Court decided *United States* v. *Cotton*, 535 U.S. 625, 634, 122 S. Ct. 1781, 152 L. Ed. 2d 860 (2002). *Cotton* directly eliminated the jurisdictional premise for the automatic reversal rule. In *Cotton*, the Court held that an indictment containing the essential elements of the offense is not a jurisdictional prerequisite to a criminal prosecution. *See id.* at 630, 122 S. Ct. 1781 (stating that "defects in an indictment do not deprive a court of its power to adjudicate a case").

The decisions of *Russell* and *Stirone*, which we cited in support of our jurisdictional rationale in *Du Bo*, are distinguishable from *Du Bo* and do not compel the automatic reversal rule. *Russell* and *Stirone* contain strong, general admonitions about protecting the Fifth Amendment right to have a grand jury determine probable cause. *See Russell*, 369 U.S. at 770, 82 S. Ct. 1038 ("To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the

---

were federally insured. The panel reversed Defendant's conviction because the indictment omitted the "materiality" element. *United States* v. *Omer*, 395 F.3d 1087, 1089 (9th Cir. 2005) (per curiam) ("[T]he indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment.").

guaranty of the intervention of a grand jury was designed to secure."); *see also Du Bo*, 186 F.3d at 1179-80 (holding that, when "[w]e may only guess whether the grand jury" found probable cause to support the missing element, "[r]efusing to reverse . . . would impermissibly allow conviction on a charge never considered by the grand jury" (citing *Stirone*, 361 U.S. at 219, 80 S. Ct. 270)). But both *Russell* and *Stirone* were concerned with preventing the government from pursuing a theory of the crime not presented to the grand jury; the Court sought to prevent that kind of a substantive "constructive amendment" of the indictment.[3] *See Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (describing

---

[3] In *Russell*, the defendants were convicted under 2 U.S.C. § 192 of willfully refusing to "answer any question pertinent to the question under inquiry" in a congressional hearing. 369 U.S. at 751 & n.2, 752, 82 S. Ct. 1038. The Court reversed their convictions because their indictments did not identify the subject of the pertinent congressional hearings. The Court's chief concern was that one of the defendants had not received notice "of the nature of the accusation against him." *Id.* at 767, 82 S. Ct. 1038. The Court also held that, even if a bill of particulars could provide the defendant with notice, it could not ensure that the grand jury had determined the question under inquiry. *Id.* at 770, 82 S. Ct. 1038. To protect the right to grand jury indictment, the Court applied the "settled rule" that only the grand jury may amend the indictment and, accordingly, reversed the conviction. *Id.* at 770-71, 82 S. Ct. 1038.

In *Stirone*, the defendant was indicted for unlawfully interfering with interstate commerce by obstructing the movement of sand across state lines. 361 U.S. at 213-14, 80 S. Ct. 270. At trial, however, the jury was permitted to convict the defendant for interfering either with the movement of sand or with the movement of steel. *Id.* at 214, 80 S. Ct. 270. The Court held that this alternate factual theory was more than a mere variance in proof; it presented the risk of conviction for an offense different from that which the grand jury had charged. Accordingly, the Court reversed the conviction. *Id.* at 217-18, 80 S. Ct. 270.

Russell and *Stirone* as reflecting the "settled proposition of law" that "an indictment may not be amended except by resubmission to the grand jury"). Many cases, however, including the present one, do not involve a new or different theory, so it is questionable whether the Supreme Court's stated rationale must apply across the board to every kind of missing element. *See, e.g., United States* v. *Prentiss*, 256 F.3d 971, 984 n.11 (10th Cir. 2001) (en banc) (per curiam) (opinion by Baldock, J.) (distinguishing the constructive amendment at issue in *Stirone* from the mere failure to allege an essential element because, in the latter case, the indictment "sought to charge Defendant with the sole crime for which the jury convicted him").

Additionally, *Russell* and *Stirone* were decided before *Chapman* v. *California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967), in which the Court established that constitutional errors can be harmless. Even more importantly, *Russell* and *Stirone* were decided before *Neder* v. *United States*, 527 U.S. 1, 7-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1999), a case that is significant here both for its explanation of "structural error" (discussed below) and its substantive holding that omission of an element of the charged crime from jury instructions can be harmless. *See also United States* v. *Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc) (reviewing for harmless error because *Neder's* list of structural errors did not include *Stirone* and because *Neder* held that omissions from jury instructions can be harmless), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. Sept. 29, 2005) (No. 05-6764). As our sister circuits have done, we can distinguish *Russell* and *Stirone*.

C. *Our own precedents undermine* Du Bo's *premise that omissions from the grand jury are not susceptible to harmless error review.*

In *Du Bo*, we asserted that omissions from the grand jury are, in general, not proper fodder for harmless error review. We reasoned that assessing grand jury error would require the court to "'guess as to what was in the minds of the grand jury.'" *Du Bo*, 186 F.3d at 1179 (quoting *United States* v. *Keith*, 605 F.2d 462, 464 (9th Cir. 1979)). Our own precedents undermine this rationale.

When defective indictments are challenged for the first time on appeal, our cases do not mandate automatic reversal but, rather, require us to review for plain error. In so doing, we perform a prejudice analysis nearly identical to the analysis that we refused to perform in *Du Bo*. *See United States* v. *Velasco-Medina*, 305 F.3d 839, 847 (9th Cir. 2002) (holding that "any defect in the indictment was harmless"); *United States* v. *Leos-Maldonado*, 302 F.3d 1061, 1064 (9th Cir. 2002) ("*Leos* cannot meet the third condition [of the plain error standard]."). Except for the burden of proof, the third element of the plain error analysis is identical to the harmless error analysis: Both require us to determine whether the error "affect[ed] substantial rights," i.e., prejudiced the defendant. *United States* v. *Jordan*, 291 F.3d 1091, 1095-96 (9th Cir. 2002). *Compare Cotton*, 535 U.S. at 631, 122 S. Ct. 1781 (setting forth the four prongs of plain error review: (1) an error; (2) that is plain; (3) that "*affect[s] substantial rights*"; and (4) that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings" (alteration in original) (emphasis added) (internal quotation marks omitted)), *with* Fed. R. Crim. P. 52(a)

("Any error, defect, irregularity, or variance that does not *affect substantial rights* must be disregarded." (emphasis added)).

In *Velasco-Medina* and *Leos-Maldonado*, we held that omissions from indictments did not affect a defendant's "substantial rights" because the defendant had notice of the missing element, because the weight of the evidence in the trial record established that element, and because the petit jury found the element proved beyond a reasonable doubt. *Velasco-Medina*, 305 F.3d at 847; *Leos-Maldonado*, 302 F.3d at 1064-65. Those holdings make it impossible to conclude that omissions from indictments are exempt from Rule 52(a) because they "are so intrinsically harmful," *Neder*, 527 U.S. at 7, 119 S. Ct. 1827, that they necessarily "affect substantial rights." *See also id.* (describing structural errors as those that "'defy analysis by "harmless error" standards'" (quoting *Arizona* v. *Fulminante*, 499 U.S. 279, 309, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991))).

Even more significant than those plain error decisions is a case in which we applied harmless error principles to review an indictment that was challenged in district court after the trial began. *See United States* v. *James*, 980 F.2d 1314, 1319 (9th Cir. 1992) (concluding that "[t]he error in the indictment could have had no effect on the outcome of the trial and was harmless beyond a reasonable doubt" (emphasis added)); *cf. Du Bo*, 186 F.3d at 1180 n.3 (stating that its rule of automatic reversal applies only to timely—that is, pretrial—challenges).

As our cases demonstrate, it simply is not true, as we suggested in *Du Bo*, 186 F.3d at 1179-80, that it is impossible to review an omission for harmlessness. In the untimely challenge cases, we have acknowledged that it

is possible to review the prejudice caused by the omission of an element from an indictment, and in fact we have conducted both harmless error and plain error review.

D. *Encouraging timely objections to indictments is an insufficient justification for retaining* Du Bo's *automatic reversal rule.*

As noted, we have applied harmless error principles to the omission of elements from grand jury indictments in cases where the defendant did not object before trial. If we accept the view that it is possible to review defective indictments for harmless error, the only remaining basis for *Du Bo*'s rule is our desire to give defendants an incentive to bring timely objections. *See Du Bo*, 186 F.3d at 1180 n.3 (giving a practical reason for applying a rule of automatic reversal to timely challenges to indictments).

There is nothing wrong with reviewing a timely argument under a more favorable standard of review than an untimely one; we do it all the time.[4] But the fact that a defendant brings a timely objection, standing alone, cannot be sufficient to create an exemption from the general rule that errors having no effect on the outcome of a proceeding must be disregarded. See Fed. R. Crim. P. 52(a). Structural errors exempt from Rule 52(a) are "basic protections without which . . . no criminal punishment may be regarded as fundamentally

---

[4] Indeed, even if we eliminated the rule of automatic reversal, we would continue to review omissions challenged before trial more rigorously. Our established rule for challenges that come at later stages of the district court proceeding is to "liberally construe the indictment in favor of validity." *United States* v. *Chesney*, 10 F.3d 641, 643 (9th Cir. 1993).

fair." *Neder*, 527 U.S. at 8-9, 119 S. Ct. 1827 (internal quotation marks omitted).[5]

Neither the nature of the error, nor its amenability to harmless error review, is affected by the timing of a defendant's challenge. Therefore, the timeliness of a defendant's challenge cannot justify *Du Bo*'s rule of automatic reversal.

E. *Not only are the premises articulated in support of* Du Bo*'s automatic reversal rule insufficient, but Supreme Court precedent suggests the opposite result.*

The Supreme Court held in *Neder* that the omission of an element from jury instructions is subject to harmless error review. The element omitted in *Neder* was materiality, exactly the same as one of the two elements omitted from Defendant's indictment in the present case. In *Neder*, the Court ruled that the omission of the materiality element from the jury instructions was harmless beyond a reasonable doubt because the trial record contained no evidence that could have led a rational jury to find that the defendant's false statements were immaterial. 527 U.S. at 16-20, 119 S. Ct. 1827.

---

[5] Even when we have held that an error is subject to a rule of automatic reversal without deeming it "structural," as in *United States* v. *Annigoni*, 96 F.3d 1132, 1144 (9th Cir. 1996) (en banc), we did so because the error was "simply not amenable to harmless-error analysis." In this connection, I also question our holding in *Annigoni*, that even a nonstructural error can be subject to a rule of automatic reversal. Three years after we issued that decision, *Neder* reiterated the Supreme Court's two-option approach and held that, "[f]or all other [nonstructural] errors, reviewing courts must apply" a harmless error analysis. 527 U.S. at 7, 119 S. Ct. 1827 (emphasis added).

The situation in *Neder* presents a close parallel to the omission of an element from an indictment and leaves us with an incongruity: Omission of an element from an indictment is subject to automatic reversal, but omission of the same element from a jury instruction is not. Yet, the right to a grand jury finding of probable cause as to each element of the offense is no more important, no more central to the fundamental fairness of a prosecution, than the right to a petit jury's finding that each element was proved beyond a reasonable doubt. *Cf. Cotton*, 535 U.S. at 634, 122 S. Ct. 1781 ("Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt." (citation omitted)).

In deciding *Omer*, the panel distinguished *Neder* on the ground that, whereas an error in jury instructions can be assessed with reference to the trial record and the overall fairness of the trial, assessing a grand jury error would require the court to "'guess as to what was in the minds of the grand jury'" and, in any event, could not be remedied by a fair trial. *Du Bo*, 186 F.3d at 1179 (quoting *Keith*, 605 F.2d at 464). As demonstrated above, that reasoning—that there is no way to evaluate, or to cure, any prejudice caused by the omission of an element from an indictment—is undermined by a variety of cases from the Supreme Court, our court, and other circuits in which courts actually do evaluate the prejudice caused by defective grand jury indictments. The cases show that, as a matter of legal doctrine, it is possible (and, indeed, commonplace) to

review the omission of an element from a grand jury's indictment for harmless error.

Under Supreme Court precedent, most errors in grand jury proceedings are reviewed for harmless error. *See Bank of Nova Scotia* v. *United States*, 487 U.S. 250, 254, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) ("We hold that, as a general matter, a district court may not dismiss an indictment for errors in grand jury proceedings unless such errors prejudiced the defendants."); *United States* v. *Mechanik*, 475 U.S. 66, 70, 106 S. Ct. 938, 89 L. Ed. 2d 50 (1986) (same).[6] In *Mechanik*, the Court held that, although the error "had the theoretical potential to affect the grand jury's determination whether to indict these particular defendants for the offenses with which they were charged," the defendants' later conviction by a petit jury rendered the error harmless. 475 U.S. at 70, 106 S. Ct. 938; *see id.* (stating that "the petit jury's subsequent guilty verdict means not only that there was probable cause to believe that the defendants were guilty as charged, but also that they are in fact guilty as charged beyond a reasonable doubt"). At the very least, *Mechanik* suggests

---

[6] The only error in grand jury proceedings that the Supreme Court has considered structural, and thus subject to automatic reversal, is discrimination on account of race, and possibly sex, in the selection of grand jurors. *See Vasquez* v. *Hillery*, 474 U.S. 254, 260-63, 106 S. Ct. 617, 88 L. Ed. 2d 598 (1986) (race discrimination); *Bank of Nova Scotia*, 487 U.S. at 257, 108 S. Ct. 2369 (discussing its reversal because of sex discrimination in *Ballard* v. *United States*, 329 U.S. 187, 193, 67 S. Ct. 261, 91 L. Ed. 181 (1946)). In *Mechanik*, the Court interpreted the rule of *Vasquez* as a "prophylactic means of deterring grand jury discrimination in the future" and stated that such "considerations have little force outside the context of racial discrimination in the composition of the grand jury." 475 U.S. at 70 n.1, 106 S. Ct. 938.

that there is nothing about the nature of a grand jury proceeding that precludes harmless error review. In the light of *Mechanik*, if the defendant had actual notice of all elements, all were proved, and the jury was properly instructed, a missing element from a charge in the indictment can be harmless error.

The Supreme Court's cases enumerate a class of "structural errors" that are not susceptible to harmless error review. *See Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (listing such "structural errors"). The Court's decision in *Cotton* makes it extremely difficult to categorize omissions from indictments as structural errors. In *Cotton*, the Court held that one such omission "did not seriously affect the fairness, integrity, or public reputation of judicial proceedings" because the evidence of the missing element was "overwhelming and essentially uncontroverted" at trial. 535 U.S. at 632-33, 122 S. Ct. 1781 (internal quotation marks omitted). In reaching that conclusion, the Court avoided deciding directly whether the omission of an element from an indictment can be reviewed for prejudice. *See Jordan*, 291 F.3d at 1096 n.7 (noting that *Cotton* "might have been significant" to our harmless error analysis had the Supreme Court rested its decision on the "substantial rights" prong of the "plain error review"). But *Cotton* remains relevant to rebut the idea that omission of an element from an indictment always renders a criminal proceeding unfair. *Cf. Neder*, 527 U.S. at 9, 119 S. Ct. 1827 (deciding that omission of an element from jury instructions is not structural error, in part, because in *Johnson* v. *United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997), the Court had decided that the same error did not satisfy the fourth element of the plain error analysis); *United States* v. *Robinson*, 367

F.3d 278, 285 (5th Cir.) ("We have interpreted *Cotton* also to require the application of harmless error review where an indictment is defective and the defendant preserves the error by proper objection."), cert. denied, ___ U.S. ___, 125 S. Ct. 623, 160 L. Ed. 2d 466 (2004).

F. *Other circuits are increasingly abandoning* Du Bo*-like precedents in favor of harmless error review of grand jury omissions.*

Since 2001, six of our sister circuits have held explicitly that they will review defective indictments, challenged at various stages, for harmless error. *See Allen*, 406 F.3d at 945 (reviewing for harmless error an omission challenged at sentencing);[7] *Robinson*, 367 F.3d at 285 (reviewing for harmless error an omission challenged on appeal); *United States* v. *Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003) (reviewing for harmless error an omission challenged on appeal, relying on *Mechanik* and *Cotton*), cert. denied, ___ U.S. ___, 125 S. Ct. 627, 160 L. Ed. 2d 456 (2004); *United States* v. *Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580 (6th Cir. 2002) (reviewing for harmless error an omission challenged after the jury was impaneled but before trial began); *Prentiss*, 256 F.3d at 981 (overruling the 10th Circuit's earlier *Du Bo*-like precedents and relying on *Neder* and *Mechanik* to provide harmless error review for an omission challenged on appeal); *United States* v.

---

[7] *Allen* was a death penalty case. The indictment was defective because it omitted any statutory aggravating factor. 406 F.3d at 943. The defendant "presciently" objected in the district court. *Id.* The court rejected the defendant's reliance on *Stirone*, pointing out that *Chapman*, *Fulminante*, and *Neder* had changed the landscape. Adopting essentially the analysis contained in this dissent, the court held that the defect in the indictment was subject to harmless error review. *Allen*, 406 F.3d at 945-46.

Corporan-Cuevas, 244 F.3d 199, 202 (1st Cir. 2001) (reviewing for harmless error an omission challenged on appeal); see also 4 Wayne R. LaFave et al., *Criminal Procedure* § 19.3(a) (2d ed. 1999 Supp. 2005) ("[B]y a conservative count, at least five federal circuits have abandoned the traditional position mandating automatic reversal, and substituted harmless error review, for appellate review of a timely challenge to an indictment's failure to allege an essential element of the offense."). *But see United States* v. *Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) (expressly declining to decide whether harmless error review is available).

G. Omer *cleanly presents an opportunity to reconsider the rule of automatic reversal.*

In this case, Defendant cited the omission of two elements from his indictment in support of his argument for automatic reversal. The first element, materiality, was omitted from Defendant's indictment for bank fraud as well as from the jury instructions at trial. By contrast, only the indictment omitted the second element, the federally insured status of the banks defrauded by Defendant. The jury was properly instructed about the second element at trial and found beyond a reasonable doubt that the financial institutions at issue were federally insured.

The panel's decision addressed only the first omission. Applying *Du Bo*, 186 F.3d at 1179, the panel held that "the indictment's failure to recite an essential element of the charged offense, namely the materiality of the scheme or artifice to defraud, is a fatal flaw requiring dismissal of the indictment." *Omer*, 395 F.3d at 1089. Although the panel reversed solely because of the indictment's failure to allege materiality, the indictment's failure to allege that the banks were federally

insured likewise would have been subject to the rule of automatic reversal because Defendant's challenge was timely. *See James*, 980 F.2d at 1318 (stating that the failure of the indictment in *United States* v. *Coleman*, 656 F.2d 509, 511 (9th Cir. 1981), to allege that the bank was federally insured was cured by the indictment's reference to the statute setting forth that element, and thus did not require automatic reversal, *only* because the defendant's challenge was not timely).

The omission of two elements, one of which was properly instructed and one of which was not, provides a unique opportunity to decide whether those two different, commonly occurring situations require different answers with respect to the availability or application of a harmless error analysis. *See, e.g., Jordan*, 291 F.3d at 1096 (holding that, when drug quantity was neither alleged in the indictment nor proved to the jury beyond a reasonable doubt, the omission was not harmless beyond a reasonable doubt). In my view, the court en banc ought to abolish the rule of automatic reversal only in the most troubling subset of cases: convictions in which the defendant had notice of, and the jury was properly instructed regarding, the element of the crime missing from the indictment.[8]

H. *Conclusion*

I am confident that the indictment's failure to allege that the defrauded banks were federally insured did not prejudice Defendant. He does not dispute that he actually knew that federally insured status was an element of the crime. Moreover, certificates of federally insured status for each bank were provided to Defen-

---

[8] My concern, in other words, is not the result in *Omer*, but the analysis that the panel was required to use to reach it.

dant (albeit late), evidence of federal insurance was introduced at trial, the jury was instructed that it must find that the banks were federally insured and, by its verdict, the jury did so find beyond a reasonable doubt. This combination of factors plainly would satisfy the prejudice inquiry that we previously have used in untimely challenge cases and that other circuits have adopted. Nonetheless, *Du Bo* requires reversal for this defect alone.[9]

A result that makes as little common sense as that, on a recurring issue that has prompted a growing consensus in our sister circuits that harmless error review is appropriate, should result in en banc rehearing. Our practice of automatically reversing convictions when a defendant timely objects that an element of the offense was omitted from the indictment is out of step with *Neder*, *Cotton*, *Mechanik*, and our own cases reviewing the prejudice caused by the omission of elements from indictments. Accordingly, I respectfully dissent.

---

[9] By contrast, the jury was not instructed on the missing materiality element. In my view, the omission of the element from both the indictment and the instructions was not harmless beyond a reasonable doubt.